IN THE

Supreme Court of the United States

No. 78-1469

WHEELER DEALERS, INC., an Illinois corporation,

Petitioner,

versus

RALEIGH INDUSTRIES OF AMERICA, INC., a Massachusetts corporation,

Respondent.

From the:

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois
Cause Numbers 78-1307, 78-1467 and 78-1575

On Appeal From:

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
Number 76 C 2025
Honorable HUBERT L. WILL, *Judge Presiding*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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La Salle Street Press — Chicago Printed in U.S.A.

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CITATIONS

Statutes

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1331.

The amount in controversy is in excess of $10,000 exclusive of interest and costs.

THE QUESTIONS ARE SUBSTANTIAL

1. Can a mutual release clause be inserted in a renewal franchise without a complete disclosure to the parties that the mutual release clause is being inserted and that if the petitioner (Plaintiff) has any claim against the Respondent, his claim will be barred from recovery by the acceptance of the new franchise.

2. Secondly, does a franchiser have a right to insert a clause in a franchise that unless all previous claims are released, the franchiser will not grant a renewal?

3. Is the failure to specifically make a disclosure to the parties prior to the execution of the franchise renewal by the franchiser that specific rights are being released upon the execution of this document, fraud on its face?

4. Is the mere issuance of a renewal franchise sufficient consideration for the execution of a mutual release of any prior obligations?

5. That it is unlawful for a supplier in interstate commerce to grant advertisements, or other sales promotional allowances to one customer who resells the supplier's "products or commodity" unless the allowances are available on proportionately equal terms to all other customers competing in the distributorship of those products or commodities.

See *FTC* v. *Meyer,* 390 U.S. 341, 19 L Ed 2d 1222, 89 S.Ct. 904 which quotes the provision in the amended statute:

> "(1) It shall be unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

The litigation commenced with the filing of a Complaint by the Plaintiff-Appellant, alleging that on June 9, 1971, Petitioner entered into a dealer agreement with Respondent pursuant to which Petitioner was to purchase bicycles and bicycle parts from Respondent Raleigh Industries.

The Agreement contained the provision that Raleigh would provide petitioner "as a dealer" with a retail market of prime responsibility containing a reasonable number of potential customers and determined by Raleigh Respondent after market studies and analyses.

The contract further stated that it shall remain in effect for one year and said agreement may carry a renewal on a one year basis from year to year thereafter unless petitioner (Dealer) notifies Respondent (Raleigh) the other, in writing thirty days at least prior to the anniversary date of the Agreement.

Petitioner alleged that Respondent orally represented it would be the exclusive Raleigh Dealer in the Waukegan, Illinois Area.

Petitioner charged that despite promises and representations respondent appointed a company known as "Raleigh of Waukegan" (not affiliated with Respondent) as a Raleigh Dealer.

Petitioner contends that the alleged breach of the Agreement and respondent's refusal to allow petitioner as a result thereof to transfer its Raleigh franchise to a third person caused substantial losses.

The most important question that this Court is called upon to determine is whether a manufacturer, "a franchiser", can "conceal the fact" without any prior discussion

with the dealer that, by executing the new franchise the dealer will be releasing any claims that he previously had.

NO DISCLOSURE WAS MADE TO THE DEALER THAT IT WAS RELEASING ALL CLAIMS AGAINST THE FRANCHISER (MANUFACTURER) FOR THE FIRST TIME. THE DEALER EXECUTED THE FRANCHISE AS A MATTER OF COURSE NOT BEING APPRISED PRIOR TO ITS EXECUTION THAT THE FRANCHISE CONTAINED THE AUTOMATIC RELEASE. (This is a question of fact that should have been heard on the merits by the District Court.)

In the case of automobile franchisers the appointment of another dealer *when used as an instrument of coercion or intimidation* is prohibited.

If the manufacturer was not acting in good faith summary judgment should not be granted unless a trial was had on the merits.

The question also arises: *Can a manufacturer refuse to grant the renewal franchise unless the dealer executes a release for all previous accounts.*

Those are all questions of fact and this court and the District Court should have allowed the case to go to trial and not have accepted the insertion of the release in the franchise which was not knowledgeable to the plaintiffs-petitioners since they never consulted their lawyer and the court accepted the statement at face value that they had read the franchise and it therefore could be considered a release of all prior claims.

STATEMENT OF THE CASE

On June 9, 1971, Raleigh and Wheeler Dealers entered into a dealer agreement pursuant to which Wheeler Dealers purchased bicycles and bicycle parts from Raleigh. The agreement contained a provision that Raleigh would "provide Dealer with retail market area of prime responsibility containing a reasonable number of potential customers and determined by Raleigh after market study and analysis." The contract further stated that it "shall remain in effect for one year and shall automatically be renewed on a year-to-year basis thereafter unless either Raleigh or dealer notifies the other in writing at least 30 days prior to the annual anniversary date of this agreement."

Wheeler Dealers now alleges that Raleigh orally represented to it that it would be the exclusive Raleigh dealer in Waukegan, Illinois although none of the franchise agreements contain any such provision. On November 26, 1973, Raleigh appointed a company known as Raleigh of Waukegan (not affiliated with defendant) as a Raleigh dealer. Wheeler Dealers contend that this alleged breach of the agreement, and Raleigh's refusal to allow plaintiff to transfer its Raleigh franchise to a third person, caused it substantial losses.

Effective January 1, 1974, Raleigh forwarded to Wheeler Dealers a new franchise and failed to disclose that there was an automatic release clause in that franchise of all previous acts that were committed by Raleigh. There was inserted a mutual release of any prior obligations.

Wheeler Dealers contended that it did not understand that clause to mean that all claims against them were automatically released by the execution of the new franchise agreement.

The Court rendered a decision based on the fact that the words "mutual release of any prior obligations" appeared in bold type and since the Dealer representative said that he read the franchise, his rights were foreclosed.

The District Court ruled that the insertion of the mutual release clause in the franchise automatically barred Wheeler Dealers' claim.

Wheeler Dealer submitted affidavits by its officers to the effect that if they knew that the execution of the new franchise agreement was intended to be a release of their claim it would not have been executed.

Wheeler Dealers' three defenses to the release and the motion for summary judgment are:

1. Raleigh committed fraud in failing to advise the defendant prior to the execution of the franchise that it was releasing all of its claims against it.

2. There was a failure to establish intent of the parties;

3. There was lack of consideration for the execution of the franchise.

And, we take into consideration that in the case of automobile manufacturers it would be illegal for it to demand that an automobile dealer release all prior claims before the manufacturer would grant him a new franchise.

Section 1222 of the Federal Automobile Dealers Day in Court Act authorizes an automobile dealer to bring suit against any automobile manufacturer engaged in commerce, in any District Court in the United States in the district where the manufacturer resides, or is found, or has an agent, for damages arising from the failure of the manufacturer to act in good faith in performing provisions of the franchise, or in terminating, canceling, or not renewing the franchise of the dealer.

That Act was especially adopted to curtail the advantage of the largest manufacturers and to increase the rights of the dealers.

The legislative intent was to assure the dealer of the opportunity to secure a judicial determination of his cause of action irrespective of the contract terms, thus precluding the doctrine of waiver or estoppel.

The condition precedent for a cause of action by the dealer against the franchiser was to prevent the manufacturer from not acting in good faith and not performing all that was required under the terms of the provision of franchise or in cancelling the franchise or not renewing the franchise.

However, the "lack of good faith" on the part of the manufacturer constituted the core of the dealer's cause of action and the burden of proving it or proving compliance with the statutory requirements fell on the dealer.

Good faith was restricted to a duty to act in a fair and equitable manner so as to guarantee freedom from coercion, intimidation or threats.

All that is required to show "lack of good faith" on the part of the manufacturer is that it was unfair and coercive.

An unfair cancelation of a franchise of a dealer without due regard to his acts or its nonrenewal without just provocation, a ground for denial or revocation of the license or the imposition of some criminal sanctions among a number of state statutes, are held to be illegal. Such state statutes have been upheld as constitutional and valid.

The dealer as well as the manufacturer is required to act in good faith.

Section 1221(e) of the Federal Automobile Dealers' Day in Court Act requires

"the duty of each party in any franchise and all officers, employees or agents thereof to act in a fair and equitable manner toward each other so as to guarantee the one party freedom from coercion, intimidation, or threats of coercion or intimidation from the other party:

"Provided: That recommendation, indorsement, exposition, persuasion, urging or argument shall not be deemed to constitute a lack of good faith."

To permit a manufacturer to put a clause in a franchise that by the execution of the franchise all previous acts against the manufacturer are released, is equivalent to having a laborer release the employer from all rights and claims that he would be compensated for under the Workmen's Compensation Act.

The releases in the Workmen's Compensation Act were declared illegal many years ago, and the same principal should apply in demanding that a dealer release his claim against the manufacturer each and every year that he receives a renewal franchise, otherwise he would not be able to get the franchise.

The case at bar does not involve a "termination before expiration" but involves only the question of: can the manufacturer demand from the dealer without any consideration a release for each and every year that the franchise is renewed.

If before the dealer ever did business with the manufacturer, that was one of the conditions that the manufacturer demanded, there might be some merit to the manufacturer's claim. But since it occurs at a later date after the dealer and the manufacturer have been doing business, the manufacturer should be "estopped from demanding a release for each renewal period, prior to the renewal of the franchise.

That this Court, in *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1, 63, 64, 31 S.Ct. 502, 55 L. Ed. 619 (as early as 1911) interpreted the Sherman Act as if the word "unreasonable" were inserted before the word "restraint."

That per se violations were determined as price fixing, re-sale, without benefit of statutory legitimizations, euphemistically sometimes referred to as "fair trade" laws, concerted boycotts or refusal to deal, secondary boycotts, or tying a patent to the use of unpatented materials. *U. S.* v. *Columbia Steel Co.,* 334 U.S. 495, 522, 68 S.Ct. 1107, 92 L.Ed. 1533 (1948).

Certainly this Court in the light of the Standard Oil decision is required to determine that the insertion in each franchise of a release of all prior claims is a restraint.

Under the rule of this Court under the Automobile Dealers Act, ibid, this court has consistently held to restrictions on the dealer a Sherman Act violation which no manufacturer can impose on an automobile dealer or require him to release his claims against the manufacturer before the dealer receives a new franchise.

If this Court does not determine that the insertion of an automatic release to obtain a franchise is a violation of the Sherman Antitrust Act, it might be construed that automobile dealers can do the same thing.

There is no question that this court cannot condone a release "without any consideration" just because a new franchise is issued. The dealer cannot be put at the mercy of the manufacturer each and every year that he gets a franchise that he is required to release the manufacturer from all of his wrongdoings under the Sherman Antitrust Act, or the Robinson-Patman Act including many other pieces of fed-

eral legislation that was enacted by the Congress to protect the dealer.

This is too great a price for a dealer to pay to the manufacturer that the latter can deprive the dealer of all of his "enforceable" rights just because he has to get a new franchise. Quite obviously if the dealer has to release his claims regardless how legitimate they may be, the manufacturer is violating the dealer's rights.

Respectfully submitted,

WILLIAM HENNING RUBIN

Law Offices of:

WILLIAM HENNING RUBIN
188 W. Randolph—714
Chicago, Illinois 60602
263-6780

DEALER AGREEMENT

THIS AGREEMENT, dated this 1st day of January, 1975, by and between RALEIGH INDUSTRIES OF AMERICA, INC. ("Raleigh"), a Massachusetts corporation, and WHEELER DEALER, INC. ("Dealer"), a Corporation having its place(s) of business at 903 Washington St., Waukegan, Ill. 60085.

In consideration of the herein contained mutual covenants and agreements, Raleigh and Dealer agree as follows:

1. *Appointment—Use of Raleigh Trademarks and Trade Names.* Raleigh hereby appoints Dealer as a Raleigh Dealer of Raleigh bicycles, parts and accessories (collectively referred to herein as "Raleigh Products"), with the nonexclusive right, subject to all the conditions of this Agreement, to use in connection with Raleigh Products only the Raleigh trademarks and trade names which Raleigh has the right to license. Dealer agrees that Raleigh's parent corporation, Raleigh Industries, Ltd., is the sole owner of such trademarks and trade names; and Dealer further agrees that Raleigh and Raleigh Industries, Ltd. have the paramount right, title and interest to the use and licensing of all such trademarks and trade names, that all such trademarks and trade names remain vested therein and Dealer claims no rights therein.

2. *Term.* This Agreement shall remain in full force and effect until December 31 of this calendar year, and shall thereafter be automatically renewed for one year terms unless either party hereto gives written notice of nonrenewal to the other party at least sixty days prior to the end of the then calendar year, in which event this Agreement shall terminate at the end of said calendar year. The word "termination" as used in this Agreement shall include termination at the end of the then current calendar year pursuant to written notice of nonrenewal as well as early termination as provided in Paragraph 5 hereof.

3. *Obligations of Raleigh to Dealer.* Raleigh agrees in connection with Raleigh Products to:

(a) ship Raleigh Products to Dealer pursuant to orders accepted by Raleigh at its Divisional Offices. All shipments shall be at the prices and according to the Dealer Terms of Trade established by Raleigh and in effect at the time of shipment thereof. All orders to Raleigh must be in writing and are subject to acceptance by Raleigh. Prices and terms are subject to change by Raleigh from time to time without notice. Raleigh may decline to make shipment if, in its opinion, Dealer has failed to perform any of its obligations under this Agreement or Dealer's financial status does not justify the extension of additional credit. Additionally, Raleigh reserves the right, based on the past credit record or present financial condition of the Dealer, at any time, to require that cashier's or certified checks in the amount of the order accompany the order. Raleigh shall not be liable for any delay or failure in the manufacture, shipment or delivery of Raleigh Products ordered by Dealer and accepted by Raleigh if such delay or failure shall be due to any cause whatsoever beyond the control of Raleigh;

(b) replace defective parts at no charge to Dealer in accordance with the then current Raleigh warranty attached to each bicycle, or, in the alternative, in Raleigh's sole discretion, provide an appropriate allowance for such defective parts;

(c) provide Dealer with advertising and promotional material at reasonable cost, and, subject to the conditions thereof, afford Dealer the opportunity to participate in Raleigh's national advertising program and in any contest sponsored by Raleigh;

(d) assist and consult with Dealer as to sales promotion and servicing; and

(e) provide dealer with Raleigh Products which are in accordance with applicable regulations of the Consumer Product Safety Commission.

4. *Obligations of Dealer to Raleigh.* Dealer agrees to:

(a) sell, display and repair Raleigh Products at the location(s) specified above;

(b) make all reasonable efforts to develop, promote and maintain an adequate volume of sales at retail of Raleigh Products at the location(s) specified above;

(c) give due prominence to Raleigh Products in all Dealer's promotional activities and advertising, prominently exhibit in all displays an adequate number of Raleigh bicycles fully assembled to Raleigh published standards, and prominently display and explain the Raleigh warranty. Dealer agrees not to give undue precedence to a competitive bicycle in any such activities;

(d) maintain an adequate supply of genuine Raleigh replacement parts, maintain service facilities in accordance with specified Raleigh standards and provide satisfactory service on all Raleigh bicycles sold by Dealer;

(e) prominently display the Raleigh outdoor sign at all times;

(f) pay promptly, in cash or by check (covered by sufficient funds) for all Raleigh Products ordered by Dealer in accordance with the Dealer Terms of Trade issued by Raleigh; and

(g) assemble and sell Raleigh bicycles in a fully assembled state in accordance with applicable Federal, state and local maintenance, operation and safety laws and regulations, and Raleigh published standards. Dealer further agrees to maintain, in the form prescribed by Raleigh, such information as Raleigh deems necessary or requests in order for Raleigh to comply with the regulations of the Consumer Product Safety Commission, and to promptly provide such information to Raleigh. Dealer shall indemnify Raleigh and hold it harmless from and against any and all claims, damages or penalties of any type or character asserted against

Raleigh arising out of or resulting from Dealer's failure to comply fully with the preceding sentences of this Paragraph 4(g).

5. *Early Termination.* Raleigh reserves the right to terminate this Agreement at any time on fifteen (15) days notice to Dealer for good cause, which shall include but not be limited to, any of the following:

(a) any breach by Dealer of this Agreement;

(b) failure of any check submitted by Dealer to clear for reason of insufficient funds or otherwise, which failure is not remedied within said 15 day period;

(c) any attempted transfer or assignment of this Agreement or of any right or obligation hereunder without the express written consent of Raleigh;

(d) any sale, change, transfer or relinquishment, voluntary or involuntary, by operation of law or otherwise, of any interest in the direct or indirect ownership or management of Dealer;

(e) insolvency or bankruptcy of Dealer or assignment by Dealer for the benefit of creditors;

(f) any submission by Dealer to Raleigh of any false or fraudulent application, claim or statement.

6. *Obligations on Termination.* (a) Upon termination of this Agreement for any reason, Dealer shall cease to be a Raleigh Dealer and shall immediately: cease and desist any and all use of the trademarks and trade names referred to in Paragraph 1 hereof; eliminate the use of the word "Raleigh" and all such trademarks and trade names from all stationery and other written matter used by Dealer; remove, at Dealer's sole expense, all signs erected or used by Dealer which bear such trademarks and trade names or any other words indicating that Dealer is a dealer with respect to any Raleigh Product; and permanently discontinue all advertising of Dealer as a Raleigh Dealer.

(b) Upon termination of this Agreement, Raleigh shall purchase at Dealer's request, (at the price originally invoiced to Dealer) all unsold Raleigh Products still in original packaging.

(c) If Dealer shall fail to comply with any provision of this Paragraph 6, Dealer agrees to reimburse Raleigh upon demand therefor for any and all costs and expenses, including attorneys' fees, incurred by Raleigh in connection with any action taken by Raleigh to enforce compliance herewith.

(d) The termination of this Agreement for any reason shall not serve to release Dealer from any obligations hereunder which shall have been incurred as of the effective date of said termination.

(e) The delivery of any Raleigh Product or the acceptance of any orders therefor after the termination of this Agreement shall not act to extend the term hereof or in any way affect said termination.

7. *No Liability for Termination.* Neither party hereto shall be liable to the other in any manner by reason of termination of this Agreement as provided herein.

8. *Good Will.* Dealer shall not have or acquire by the execution of this Agreement or by performance hereunder, or otherwise, any vested or proprietary right with respect to the distribution or sale of Raleigh Products. Any good will created with respect to Raleigh Products is and shall remain exclusively the property of Raleigh. Any expenditure by Dealer, for any reason including but not limited to advertising or promotion of Raleigh Products, is made with the knowledge that this Agreement can terminate as provided herein, and Dealer shall have no claim against Raleigh for such expenditures.

9. *Dealer as Independent Contractor.* This Agreement does not constitute Dealer as an agent, legal representative or employee of Raleigh for any purpose whatsoever, and Dealer shall represent itself only as an independent contractor.

10. *No Transfer or Assignment.* Dealer shall not transfer or assign this Agreement, or any of its rights or obligations hereunder, without the written consent of Raleigh.

11. *Notices.* Any notice required to be given under the terms hereof shall be in writing and delivered personally or by mail to the parties at the respective addresses shown herein.

12. *Mutual Release of any Prior Obligations.* Dealer and Raleigh, for and in consideration of the execution of this Agreement, each hereby releases and forever discharges the other party hereto of and from any and all manner of actions, causes of actions, suits, contract claims, antitrust claims, debts, agreements, damages, judgments, claims and demands whatsoever, which either may have ever had or now has against the other party hereto as a result of or by reason of any act, matter, cause or thing whatsoever, excepting only sums owing for Raleigh Products delivered to Dealer and credits relating thereto, and warranty and cooperative advertising claims existing as of the date of execution of this Agreement.

13. *Acceptance of Agreement.* This instrument when signed by Dealer and delivered to Raleigh shall be deemed an application for appointment as a Raleigh Dealer on the terms incorporated herein and shall not become effective until signed as accepted by Raleigh's Divisional Manager. Upon such acceptance this instrument shall be effective as of the date first above written.

14. *Entire Agreement.* This instrument contains the entire agreement between the parties, and there are no terms or agreements between the parties not contained herein. This Agreement may be modified only by an instrument in writing signed by both Raleigh's Division Manager and Dealer. This Agreement cancels and supersedes all prior agreements between the parties.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed on the day and year first above written.

RALEIGH INDUSTRIES OF AMERICA, INC.
350 Secaucus Road
Secaucus, New Jersey

by _____
Chairman and President

Accepted by:

_____
Divisional Manager

Dealer: _____

by _____
President

OFFICE USE
Dealer Agreement
No. 5027-12-0175

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

(Argued May 26, 1978)

January 24, 1979

Before

Hon. THOMAS E. FAIRCHILD, Chief Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROY W. HARPER, Senior District Judge*

WHEELER DEALERS, INC.
an Illinois corporation,
Plaintiff-Appellant,

vs.

Nos. 78-1307, 78-1467 & 78-1572

RALEIGH INDUSTRIES OF AMERICA, INC.,
a Massachusetts corporation,
Defendant-Appellee

Appeal from Order of the United States District Court for the District of Illinois, Eastern Division.

No. 76-C-2025
HUBERT L. WILL, District Judge.

ORDER

This case is an appeal from two orders of the District Court, the first entered December 5, 1977, granting summary judgment for defendant-appellee, Raleigh Industries of America, Inc. (hereinafter Raleigh), and the second entered March 6, 1978, taxing costs against plaintiff-appellant, Wheeler Dealers, Inc. (hereinafter Wheeler).

On June 9, 1971, Raleigh and Wheeler entered into a dealer agreement pursuant to which Wheeler was authorized to purchase bicycles and bicycle parts from Raleigh. The

* Senior District Judge Roy W. Harper of the Eastern and Western Districts of Missouri sitting by designation.

agreement contained a provision that Raleigh would "provide Dealer with retail market area of prime responsibility containing a reasonable number of potential customers and determined by Raleigh after market study and analysis." The contract further stated that it "shall remain in effect for one year and shall automatically be renewed on a year-to-year basis thereafter, unless either Raleigh or Dealer notifies the other in writing at least 30 days prior to the annual anniversary date of this agreement."

By certified letter dated October 21, 1974, Raleigh terminated its prior agreement with Wheeler effective December 31, 1974. In that same letter, Raleigh offered to do business with Wheeler under a new dealer agreement which was enclosed with that letter. On or about January 1, 1975, Wheeler by its president, Clifford M. Geddes, Jr., signed that two-page agreement. Paragraph 12 of the 1974 agreement contained a mutual release stated in the following terms:

> "12. MUTUAL RELEASE OF ANY PRIOR OBLIGATIONS. Dealer and Raleigh, for and in consideration of the execution of this Agreement, each hereby releases and forever discharges the other party hereto of and from any and all manner of actions, causes of actions, suits, contract claims, antitrust claims, debts, agreements, damages, judgments, claims and demands whatsoever, which either may have ever had or now has against the other party hereto as a result of or by reason of any act, matter, cause or thing whatsoever, excepting only sums owing for Raleigh Products delivered to Dealer and credits relating thereto, and warranty and cooperative advertising claims existing as of the date of this Agreement."

On November 26, 1973, Raleigh appointed a company known as Raleigh of Waukegan (not affiliated with Raleigh) as an additional Raleigh dealer. On June 1, 1976, Wheeler

filed suit and alleged *inter alia* that Raleigh orally represented in 1971 that it would be the exclusive Raleigh dealer in Waukegan, Illinois. Wheeler asserted that the appointment on November 26, 1973, of an additional Raleigh dealer constituted a breach of the oral agreement, and that this, coupled with Raleigh's refusal to allow plaintiff-appellant Wheeler to transfer its Raleigh franchise to a third person, caused it to lose sales.

In its answer to Wheeler's complaint, Raleigh denied the allegations and pleaded the defense of a mutual release, which was contained in the dealer agreement entered into on or about January 1, 1975.

Based upon Wheeler's pleadings, affidavits and the deposition transcripts of Wheeler's officers, the District Court concluded that no genuine issue of material fact existed with respect to Wheeler's defenses of mutual mistake, lack of consideration, and fraud in the execution of the 1975 Dealer Agreement, and thus it granted Raleigh's motion for summary judgment.

Raleigh then filed its Bill of Costs after entry of the summary judgment order on December 5, 1977. The District Court granted Raleigh's Bill of Costs by order entered March 6, 1978.

Wheeler now appeals both the summary judgment order and the order granting costs.

Jurisdiction in this case is alleged to be based upon diversity of citizenship and jurisdictional amount, but important jurisdictional allegations are absent. Thus, before addressing the merits of this appeal we must resolve the jurisdictional question. In *Illinois Terminal R. Co.* v. *Friedman,* 208 F. 2d 675, 676 (8th Cir. 1953), the court held:

> "A federal appellate court, in a case under review, must satisfy itself not only of its own jurisdiction but also of that of the District Court. *Mitchell* v. *Mauer,* 293 U. S. 237, 244, 55 S. Ct. 162, 79 L. Ed. 388."

In *Mayer Paving & Asphalt Co.* v. *General Dynamics Corp.,* 486 F. 2d 763, 771 (7th Cir. 1973), it was noted: "Lack of subject matter jurisdiction is not waivable and must be raised by the Court on its own motion * * *."

It is alleged in plaintiff's complaint that Wheeler is an Illinois corporation and that Raleigh, the defendant, is a Massachusetts corporation "qualified to do and at all times herein transacting business in the State of Illinois." Plaintiff also alleged that the amount in controversy exceeded the sum of $10,000.00, exclusive of interest and costs. Finally, the alleged basis of the District Court's jurisdiction was diversity of citizenship under 28 USC 1332.

Where the District Court's jurisdiction is founded upon diversity of citizenship under 28 USC 1332(a) and at least one of the parties to the action is a corporation, 28 USC 1332(c) must be considered. 28 USC 1332(c) provides:

> "For purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any state by which it has been incorporated and of the State where it has its principal place of business."

Thus, with respect to jurisdiction under 1332(a), "an allegation regarding the principal place of business of each corporate party must be made in addition to an allegation regarding its place of incorporation." 2A Moore's Federal Practice, ¶ 8.10, at 1657-58; see *Wymard* v. *McCloskey & Co.,* 342 F. 2d 495 (3rd Cir. 1965), cert denied 382 U. S. 823 (1965); *Guerrino* v. *Ohio Casualty Insurance Co.,* 423 F 2d 419 (3rd Cir 1970). While plaintiff did allege its own state of incorporation, as well as that of defendant's, there is no allegation in plaintiff's complaint with respect to the state of either party's principal place of business. It is admitted

in defendant-appellee's brief that appellant's principal place of business is in Waukegan, Illinois. However, we find no evidence in the record with respect to the state of the appellee's principal place of business.

At oral argument of the appeal, this Court raised the question of the District Court's jurisdiction to hear this case in view of the absence of any allegation or information with regard to the state of appellee's principal place of business. In response to our inquiry, counsel for appellee, in open court, after private discussions between the attorneys for both appellant and appellee, stated that New Jersey was the state of appellee's principal place of business for purposes of 28 USC 1332. Counsel for appellant, in open court, concurred in the statement by appellee's counsel, and asked the Court's permission to file supplemental pleadings to correct the jurisdictional defects in its complaint. This Court granted the appellant's request to file supplemental pleadings. In view of the admissions made by appellee's counsel, both in his brief and in open court, coupled with the concurrence of appellant's counsel and the assurance that a supplemental complaint would be submitted correcting the jurisdictional defects, this Court is satisfied that the requisite diversity of citizenship does in fact exist so as to authorize jurisdiction in the District Court. See, *Mullins* v. *Beatrice Pocahontas Company,* 489 F.2d 260 (4th Cir. 1974).

We turn now to the merits of this appeal. Under Rule 56(c) Fed. R. Civ. P., a summary judgment shall be rendered forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In reviewing the granting of a summary judgment this Court must "determine whether there is any issue of material fact underlying the adjudication, and if not, whether the substantive law was correctly applied." 6 Pt. 2 Moore's Federal Practice (2d Ed.) ¶ 56.27[1], p. 56-1555; *United States* v. *Bissett-Berman Corporation,* 481 F.2d 764, 767 (9th Cir. 1973); *Vickery* v. *Fisher Governor Co.,* 417 F.2d 466 (9th Cir. 1969). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue as to any material fact. *Adickes* v. *S. H. Kress & Co.,* 398 U. S. 144, 157 (1970). For the purpose of determining whether any material fact remains disputed, all factual inferences must be drawn in the light most favorable to the party opposing the motion. *Fitzsimmons* v. *Best,* 528 F.2d 692, 694 (7th Cir. 1976); *U. S.* v. *Diebold, Inc.,* 369 U. S. 654 (1962).

Under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), it is clear that a federal court sitting in a diversity action must apply the substantive law of the state in which it sits as well as that state's conflict of laws. *Klaxon Co.* v. *Stentor Electric Mfg. Co., Inc.,* 313 U. S. 487 (1941). The rule in Illinois is that the validity of a release is governed by the law of the jurisdiction under which the release is given and delivered. *Woodbury* v. *United States Casualty Co.,* 284 Ill. 227, 120 N. E. 8 (1918); *Frazier* v. *Sims Motor Transport Lines, Inc.,* 196 F.2d 914, 917 (7th Cir. 1952); *Roman* v. *Delta Air Lines, Inc.,* 441 F.Supp. 1160, 1166 (N.D. Ill. 1977). In the present case, since the Dealer Agreement containing the Mutual Release was delivered and signed in the State of Illinois, it is Illinois law that determines whether the release in question was a valid one. Under Illinois law a release is a contract, and thus its construction is governed by the rules of law that prevail in contract cases. *Brackeen* v. *Milner,* 232 N. E. 2d 241 (1st

Dist. 1967); *Affiliated Realty and Mortgage Co.* v. *Jursich,* 308 N.E. 2d 118, 122 (1st Dist. 1974).

In *Richard's Lumber & Supply Co.* v. *U. S. Gypsum Co.,* 545 F. 2d 18, 20 (7th Cir. 1976), cert. denied 430 U. S. 915 (1977), the court said: "A general release or a broad covenant not to sue is not ordinarily contrary to public policy simply because it involves antitrust claims." It is well settled in the State of Illinois that in the absence of fraud in the inducement, mutual mistake, or some other defense, a release of the kind executed in the present case is fully enforceable and a complete bar to plaintiff's cause of action. *Blaylock* v. *Toledo, Peoria & Western R. Co.,* 356 N. E. 2d 639 (3rd Dist. 1976); *Fabert Motors, Inc.* v. *Ford Motor Co.,* 355 F. 2d 888 (7th Cir. 1966), cert. denied 384 U. S. 939, reh. denied 384 U. S. 967 (1966). In *Florkiewicz* v. *Gonzales,* 347 N. E. 2d 401, 405 (1st Dist. 1976), the Court had this to say:

> "The courts in Illinois have refused to permit any form of words, no matter how all-encompassing, to foreclose scrutiny of a release and the attendant circumstances to be sure that it was fairly made and accurately reflected the intentions of the parties. *(Ruggles* v. *Selby* (1960), 25 Ill. App. 2d 1, 13, 165 N. E. 2d 733.*)*"

In opposition to the motion for summary judgment, appellant alleged fraud and misrepresentation on the part of appellee in having the Mutual Release Clause inserted in the Dealer Agreement. Appellant contends that the question of fraud and misrepresentation in the execution of the Mutual Release raises an issue of material fact. In support of its contention appellant asserts that the sole purpose of the Release Clause was to perpetrate a fraud on appellant. Furthermore, appellant contends that the failure of the appellee to explain the meaning of the Mutual Release is evidence of fraud on the part of appellee.

The Court cannot agree with appellant. In reviewing the record, the Court finds no evidence of facts which might support an inference of fraud on the part of appellee. Furthermore, appellant has called to our attention no facts in support of its allegation of fraud. Rather, appellant relies upon speculation as to appellee's purpose in including the release in the Dealer Agreement and the fact that appellee did not explain the meaning of the release as being evidence of fraud. The Court does not believe either contention provides a factual basis in support of a claim of fraud, and thus we find no issue of material fact existing with respect to appellant's charge of fraud. See, *Blaylock* v. *Toledo, Peoria & Western R. Co.,* supra.

The second argument of appellant was to the effect that the intent of the parties was not manifested in the terms of the Mutual Release. Appellant asserts that whether the plaintiff and defendant both considered the execution of the Dealer Agreement a release of the claims of each other is a question of material fact, thus precluding summary judgment.

In his deposition, Mr. Geddes, president of appellant, stated that he read the Dealer Agreement and discussed it with Mr. Weitzman prior to signing it. The relevant section of the Agreement was plainly labeled in bold face type: "MUTUAL RELEASE OF ANY PRIOR OBLIGATIONS." The language used in the Mutual Release Clause was unambiguous and was not of a type which could not be understood by the reasonable businessman. Under these circumstances, the intent of the parties is readily ascertainable by the trial court without submission as to the trier of fact. *Redel's, Inc.* v. *General Electric Co.,* 498 F. 2d 95 (5th Cir. 1974); *Blaylock* v. *Toledo, Peoria & Western R. Co.,* supra.

With respect to appellant's charge of a lack of consideration, we find no merit in such claims. The agreement itself contained a mutual promise on the part of both parties to release the other from "any and all manner of actions * * *." It is well settled in the State of Illinois that mutual and concurrent promises afford sufficient legal consideration for the support of each other. *Leisure* v. *Smith,* 13 Ill. App. 3d 1070, 302 N. E. 2d 177 (1973); *Funk* v. *Hough,* 29 Ill. 145; *Nathan* v. *Leopold,* 108 Ill. App. 2d 160, 247 N. E. 2d 4 (1969).

Turning to the order of the District Court assessing costs against appellant, it is appellant's contention that the motion was not filed within ten days after entry of judgment as required by Rule 59(e) Fed. R. Civ. P. The order of the District Court granting defendant's motion for summary judgment is *dated* December 1, 1977. Nevertheless, the docket indicates that the summary judgment order was not entered on the docket until December 5, 1977. On December 14, 1977, Raleigh's bill of costs was filed. Appellant asserts that December 1, 1977, is the date of entry of judgment for purposes of Rule 59(e), and since Raleigh's bill of costs was not filed until December 14, 1977, it fails to meet the ten-day requirement and thus is untimely.

We find no merit in appellant's argument. It is well settled that Rule 58 of the Federal Rules of Civil Procedure providing that "every judgment" of a district court "shall be set forth on a separate document", which, *inter alia,* starts the time limit for appeals and post trial motions running, is a mechanical provision which must be mechanically applied to render certain the date on which a judgment is entered. *United States* v. *Indrelunas,* 411 U. S. 216. We do not understand that any limitation on *Indrelunas* in *Bankers Trust Co.* v. *Mallis,* 435 U. S. 381, 386, fn. 7, detracts from its authority in the circumstances of this case.

Thus, December 5, 1977, constituted the date of entry of judgment, and since appellant's motion to assess costs was filed on December 14, 1977, it satisfied the ten-day requirement and was not untimely.

For the above stated reasons we affirm the judgment of the District Court.